3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 220111-0009]

RIN 0648-BK70

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Resources of the Gulf of Mexico; Requirement for a Descending Device or Venting Tool

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS implements regulations to clarify terms used in the Direct Enhancement of Snapper Conservation and the Economy through Novel Devices Act of 2020 (Descend Act). Section 3 of the Descend Act requires commercial and recreational fishermen to have a descending device or a venting tool on the vessel and ready for use when fishing for federally managed reef fish species in Gulf of Mexico (Gulf) Federal waters. The purpose of this final rule is to clarify the definitions of descending device and venting tool in the Descend Act.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Electronic copies of the Descend Act and the Regulatory Flexibility Act (RFA) analysis for this proposed

rule may be obtained from *www.regulations.gov* or the NMFS Southeast Regional Office website at *https://www.fisheries.noaa.gov/action/descending-device-and-venting-tool-direct-enhancement-snapper-conservation-and-economy*.

FOR FURTHER INFORMATION CONTACT: Peter Hood, NMFS Southeast Regional Office, telephone: 727-824-5305, or email: *peter.hood@noaa.gov*.

SUPPLEMENTARY INFORMATION: On January 13, 2021, the majority of the Descend Act became effective with the exception of section 3, which became effective on January 13, 2022. Section 3 of the Descend Act amends the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by adding section 321, titled "Required possession of descending devices." Section 321 of the Magnuson-Stevens Act requires fishermen on commercial vessels, charter vessels and headboats (for-hire vessels), and private recreational vessels to have a descending device or venting tool rigged and ready to use when fishing for Gulf reef fish in Federal waters.

On November 9, 2021, NMFS published a proposed rule in the **Federal Register** to clarify the terms used in the Descend Act and requested public comment through December 9, 2021 (86 FR 62137). The proposed rule provides additional background and rationale for the actions contained in this final rule.

This final rule clarifies the statutory definitions in the Descend Act of "descending device" and "venting tool," which are devices designed to help reduce post-release mortality of fish from the effects of barotrauma.

Gulf reef fish are those fish included in the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (Reef Fish FMP). A list of Gulf reef fish can be found in Table 3 of Appendix A to 50 CFR part 622 - Species Tables; Gulf Reef Fish, *https://www.ecfr.gov/current/title-50/chapter-VI/part-622/appendix-Appendix%20A%20to%20Part%20622*. For purposes of management under the Reef Fish FMP, Federal waters in the Gulf begin seaward of 9 nautical miles (16.7 km) from the coast off all the Gulf States (Pub. L. 114-113, December 18, 2015, and Pub. L. 115-31, May 5, 2017).

Barotrauma is an injury that may occur to fish caused by the expansion of gas inside a fish from the rapid decrease of water pressure that occurs when a fish is retrieved from depth. Signs of barotrauma in fish include a distended abdomen, bulging eyes, an everted stomach, and bubbling under the scales. Fish experiencing barotrauma often have difficulty returning to deeper water or float on the surface, which makes them more vulnerable to predation from dolphins, sharks and other fish, and seabirds. Fishermen can help reduce mortality to fish they release by using a descending device or a venting tool when barotrauma

is affecting a fish that has been caught. A descending device lowers the fish back to depth where internal gases recompress and the fish can be released. A venting tool can release gases in a fish's abdomen at the surface allowing the fish to swim unaided back to depth.

The Descend Act defines the term "descending device" as an instrument that will release a fish at a depth sufficient for the fish to be able to recover from the effects of barotrauma; is a weighted hook, lip clamp, or box that will hold the fish while it is lowered to depth, or another device determined to be appropriate by the Secretary of Commerce (Secretary); and is capable of releasing the fish automatically, releasing the fish by actions of the operator of the device, or by allowing the fish to escape on its own. This final rule clarifies that the depth sufficient for a fish to be able to recover from the effects of barotrauma is the depth at which the fish was caught and specifies the minimum weight and minimum length of line required to be consistent with the current regulatory definition of descending device at 50 CFR 622.188(a)(4). The regulations in paragraph 622.188(a)(4) were put in place by NMFS in 2020 to implement the South Atlantic Fishery Management Council's Regulatory Amendment 29 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic (Snapper-Grouper FMP) (85 FR 36166, June 15, 2020). Those regulations require a

descending device be on board a vessel and be ready for use while fishing for or possessing South Atlantic snapper-grouper.

The Descend Act states that the term "venting tool" has the meaning given to it by the Gulf Council. The Gulf Council defines the term "venting tool" in its Policy on the Use of Venting Tools and Descending Devices as a sharpened, hollow instrument capable of penetrating the abdomen of a fish to release the excess gases accumulated in the body cavity. The definition also indicates a device that is not hollow, such as a knife or ice pick, is not a venting tool and will cause additional damage to a fish. This final rule clarifies that this definition of venting tool applies to the Descend Act requirements.

Management Measures Contained in this Final Rule

Consistent with the requirement in the Descend Act, this final rule requires a descending device or a venting tool on the vessel that is rigged and ready for use while fishing for Gulf reef fish is occurring. This final rule also clarifies the statutory definitions of descending device and venting tool to assist Gulf reef fish fishermen in complying with the statutory requirement. NMFS is not approving or determining the sufficiency of any specific devices through this final rule.

Descending Device

This final rule defines a descending device as a device capable of releasing a fish at the depth from which the fish was caught, and specifies that the device must use a minimum of a 16-ounce (454-gram) weight and a minimum of a 60-ft (15.2-m) length of line. A 16-ounce weight is available at many tackle shops, or may be homemade, and is heavy enough to descend a majority of Gulf reef fish subject to barotrauma. However, using more weight would help to descend a large fish or where currents are strong. NMFS specifies in this final rule that a 60-ft (18.3-m) minimum length for the line attached to a descending device is required to ensure fish are released at a minimum depth of 50 ft (15.2 m) while someone using the descending device is standing on the deck of a vessel, and to account for possible ocean currents or swells. Using a line long enough to release a fish at the depth from where it was caught, which may be more than 50 ft (15.2 m) in depth, will best ensure that the fish can recover from the effects of barotrauma.

These minimum specifications are also required for commercial and recreational fishermen in the South Atlantic snapper-grouper fishery. In this rule, NMFS implements the same specifications for a descending device in the Gulf reef fish fishery to increase the likelihood of compliance by fishermen who may fish in both the Gulf and South Atlantic, and to aid with enforcement.

As specified in the Descend Act, a descending device may attach to the fish's mouth, through the fish's mouth and gill plate, or it may be a box (without specific dimensions or shape) that will retain the fish while it is lowered to depth. Operating a descending device can vary between types but the device must be capable of releasing the fish at depth automatically, by actions of the device operator, or by allowing the fish to escape on its own when at depth.

If a Gulf reef fish fisherman chooses to carry a descending device to comply with the Descend Act and this final rule, there is no requirement to use a rod and reel, or any other specific method or material, to attach to the descending device and weight and then descend a fish. Although a rod and reel may be one useful way to descend a fish if the minimum line length and weight specifications are met, the Descend Act and this final rule provide flexibility for Gulf reef fish fishermen to choose the materials and methods that work best for them to descend a fish.

Venting Tool

This final rule defines a venting tool consistent with the Gulf Council's policy and removes the term "venting device" from the regulations at 50 CFR part 622. A venting tool must be capable of penetrating the abdomen of a fish to release the excess gases accumulated in body cavity when

a fish is retrieved from depth. Further, a venting tool must be a sharpened, hollow instrument that allows air to escape, such as a hypodermic syringe with the plunger removed. A 16-gauge needle, which has a standard outside diameter of 0.065 inches (1.65 mm), is the minimum diameter hollow tube that must be used. Gulf reef fish fishermen may also choose to use a larger diameter hollow needle because it will allow more air to escape from a fish rapidly. Fishermen must not use a tool that is not hollow, such as a knife or an ice pick, to vent a fish. A knife or other non-hollow tube is not a venting tool and its use would cause further injury to a fish.

While the Descend Act and this final rule allow Gulf reef fish fishermen to choose whether to carry a descending device or venting tool on a vessel, there is nothing that prevents fishermen from carrying both types of devices. Fishermen may find that they favor a certain device for individual situations. More information on the Descend Act and links to information on descending devices and venting tools may be found at *https://www.fisheries.noaa.gov/action/descending-device-and-venting-tool-direct-enhancement-snapper-conservation-and-economy.*

Expiration of Requirements

The requirement in section 3 of the Descend Act expires 5 years after its enactment. Therefore, the

provisions contained in this final rule will also end after January 13, 2026, unless the Gulf Council or NMFS take further action to retain any of the regulatory provisions.

Comments and Responses

NMFS received 29 public comments on the proposed rule from individuals, three recreational fishing advocacy groups, and a commercial fishing advocacy group. Most comments were directed to the requirement in the Descend Act to possess a descending device or venting tool, and some of those comments asked NMFS to make an exception for spearfishing trips. These comments were outside the scope of the proposed rule, and therefore, are not addressed further in this final rule. NMFS acknowledges the comments in favor of all or part of the proposed rule, and agrees with them. Comments seeking clarification or that are opposed to the proposed rule are grouped as appropriate and summarized below, each followed by NMFS' respective response.

Comment 1: NMFS should clarify what "rigged and ready for use when fishing" means with respect to the descending device and venting tool requirement.

Response: As previously explained, descending devices and venting tools are used to help reduce post-release mortality of fish caused by barotrauma. To be effective, fishermen must have this equipment ready to use with as little delay as possible. Therefore, NMFS expects fishermen

who choose to carry a descending device to have the device attached to a line with the weight, and be ready to descend a fish as soon as fishing activities begin. Fishermen who choose to carry a venting tool on their vessel must have the venting tool readily available for immediate use as soon as fishing activities begin.

Comment 2: Explain why NMFS is requiring a 16-ounce minimum weight when less weight can also work to descend fish.

Response: As stated in the proposed rule, a 16-ounce weight is available at many tackle shops and is heavy enough to descend a majority of Gulf reef fish subject to barotrauma. In addition, requiring this minimum weight will make these regulations consistent with the regulations in 50 CFR 622.188(a)(4), which were put in place by NMFS in 2020 to implement the South Atlantic Fishery Management Council's (South Atlantic Council) Regulatory Amendment 29 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic (85 FR 36166, June 15, 2020). NMFS expects consistent requirements to increase the likelihood of compliance by fishermen who may fish in both the Gulf and South Atlantic, and to aid with enforcement.

Comment 3: A knife is a preferred tool to vent fish and other venting tools are not needed. Venting tools tend to clog up after use.

Response: A knife is not a hollow tool, so using a

knife may not allow gases to escape the fish's abdomen, thereby preventing the fish to vent. Additionally, a knife can be misused by inserting it in an extruded fish's stomach, anus, or eyes to release internal gases. Although someone using a knife as a venting tool may have good intentions, using a knife or other non-hollow instrument to attempt to vent a fish is more likely to cause greater injury to a fish than using a venting tool as defined in this rule. A venting tool can be cleaned of fish tissue or scales by blowing in the non-sharpened end or inserting a thin wire to remove debris.

Comment 4: The term "box" in the definition of a descending device should be changed to container because box implies a specific shape and could limit innovations in design that for example could use tubes or irregular shapes as part of the design.

Response: Although the term "box" is in the Descend Act's definition of descending device, the shape or dimensions of the box are not prescribed, and the definition of a descending device in this rule states it "must be a weighted hook, lip clamp, or container that will hold the fish while it is lowered to depth." Therefore, as long as the device can retain the fish until the fish can be released at depth by actions of the device operator or by the fish swimming away on its own, fishermen may choose the shape or dimensions of a container-type descending

device that works best for effectively descending fish.

Comment 5: NMFS should refrain from being overly descriptive in the descending gear definitions and allow enforcement personnel to apply their experience and judgement to evaluate if devices can fulfill the requirements of this regulation.

Response: The Descend Act contains a detailed definition of a descending device. It is not NMFS' intent to make that definition more prescriptive and NMFS is not approving or determining the sufficiency of any devices through this final rule. This rule provides the minimum weight and length of line that must be used with a descending device to be consistent with the definition implemented for the South Atlantic snapper-grouper fishery, which will assist both fishermen and enforcement. As long as a descending device, whether purchased or homemade, is capable of releasing the fish at the depth at which it was caught and meets the minimum specifications in this rule as well as meets the definition in the Descend Act, the descending device complies with the requirements when fishing for Gulf reef fish.

Comment 6: Descending devices and venting tools do not work to reduce discard mortality, particularly if dolphins and sharks prey upon discarded fish. In addition, the science supporting the benefits of these devices is questionable for fish exhibiting signs of barotrauma.

Response: The South Atlantic Council's Regulatory Amendment 29 to the Snapper-Grouper FMP summarizes scientific studies that show the positive effects from the use of these devices on survival of fish species suffering from barotrauma. Those benefits have been shown for both descending devices and venting tools. With respect to predators, returning fish to depth quickly using a descending device or allowing a fish to swim on its own after venting decreases the likelihood of a released fish being eaten by a predator than if the same fish remained floating at the surface.

Comment 7: Descending devices are superior to venting tools because venting tools can get clogged and are misused by inexperienced fishermen.

Response: The Descend Act and this final rule do not require a specific device type, but allow fishermen targeting Gulf reef fish to choose between carrying a descending device or a venting tool on the vessel and ensuring that one of those devices is ready to use when fishing is occurring. Therefore, a fisherman can select the device they are most comfortable with using and fits their fishing needs. Both devices, when used properly, can increase the likelihood that a released fish survives.

Comment 8: NMFS should have a strong outreach effort to educate people on how to use descending devices and venting tools.

Response: NMFS will continue to work with the Gulf Council and other partners to develop and distribute information on descending devices and venting tools. NMFS already has links to information on using descending devices and venting tools posted on this website: *https://www.fisheries.noaa.gov/action/descending-device-and-venting-tool-direct-enhancement-snapper-conservation-and-economy.* The website links hosted by NMFS and other partners contain detailed explanations and videos on how to properly descend and vent fish.

Classification

NMFS is issuing this final rule pursuant to section 305(d) of the Magnuson-Stevens Act. Pursuant to section 305(d), this action is necessary to clarify the statutory definitions in section 3 of the Descend Act, which adds new section 321 to the Magnuson-Stevens Act that affects persons fishing for Gulf reef fish species. The NMFS Assistant Administrator has determined that this final rule is consistent with the Descend Act, other provisions of the Magnuson-Stevens Act, and other applicable law.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Magnuson-Stevens Act provides the legal basis for this final rule. No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting and record-keeping requirements

are introduced by this final rule. This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995. A description of this final rule, why it is being considered, and the purposes of this final rule are contained earlier in the **SUMMARY** and **SUPPLEMENTARY INFORMATION** sections of this final rule.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification and NMFS has not received any new information that would affect its determination. As a result, a final regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 622

Charter vessel, Commercial, Fisheries, Fishing, Gulf of Mexico, Headboat, Recreational, Reef fish.

Dated: January 11, 2022.

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Samuel D. Rauch, III

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622--FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

§ 622.2 [Amended]

2. In § 622.2, remove the definition of *venting device*.

3. In § 622.30, revise the introductory text and add paragraph (c) to read as follows:

§ 622.30 Required fishing gear.

For a person on a vessel to fish for Gulf reef fish in the Gulf EEZ, the following fishing gear must be on the vessel and such person must use the gear as specified in paragraphs (a) and (b) of this section.

* * * * *

(c) *Gear required by the DESCEND Act of 2020*. For a person on a vessel to fish for Gulf reef fish in the Gulf EEZ, a descending device or a venting tool that is rigged

and ready for use while fishing is occurring must be on the vessel. The requirements in this paragraph (c) are effective until January 14, 2026.

(1) *Descending device*. A descending device is an instrument capable of releasing a fish at the depth from which the fish was caught.

(i) The descending device must be a weighted hook, lip clamp, or container that will hold the fish while it is lowered to depth. The device must be capable of releasing the fish automatically, by actions of the operator of the device, or by allowing the fish to escape on its own when at depth.

(ii) The descending device must use a minimum of a 16-ounce (454-gram) weight and a minimum of a 60-ft (15.2-m) length of line.

(2) *Venting tool*. A venting tool is a device capable of penetrating the abdomen of a fish to release the excess gases accumulated in the body cavity when a fish is retrieved from depth. A venting tool must be a sharpened, hollow instrument that allows air to escape, such as a hypodermic syringe with the plunger removed. A 16-gauge needle, which has an outside diameter of 0.065 inches (1.65 mm), is the minimum diameter hollow tube that must be used. A larger diameter hollow needle is preferred to allow more air to escape from a fish rapidly. A device that is not

hollow, such as a knife or an ice pick, is not a venting tool and will cause additional damage to a fish.

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